

No. 20,771

IN THE

United States Court of Appeals
For the Ninth Circuit

SAYRE & Co., LTD.,

Appellant,

vs.

A. G. MADDOX,

Appellee.

APPELLEE'S BRIEF

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JURISDICTIONAL STATEMENT

Jurisdiction of this action is vested in the District Court of Guam by Section 31 of the Organic Act of Guam, as amended. 72 Stat. 681 (1958), 48 U.S.C.A. Section 1421i(h) (i). This Court has jurisdiction of this appeal. 28 U.S.C. Sections 41, 1291 and 1294(4).

STATEMENT OF FACTS

John L. Sayre in 1948 in Hawaii organized a corporation, all the stock of which, except for qualifying shares, was owned by him (R 2). The corporation was primarily organized to sell vacuum cleaners on a door-

to-door basis. As the Hawaiian market became saturated, Sayre determined to open a business in Guam. The principal item at that time was the Kirby Vacuum Cleaner. In order to undertake the business in Guam, Mr. Sayre did the following:

As Sayre and Company, Ltd., he loaned to himself in Guam a sufficient amount of money, supplies, materials, furniture and other items to begin the operation of the business in Guam, the Guam business being operated under the name of The Kirby Company of Guam (R 20). Further, he contacted a number of leading manufacturers in the United States and obtained the exclusive franchise for the sale of refrigerators, stoves and other items, as he already had the exclusive franchise for the sale of Kirby Vacuum Cleaners (R 21).

As the Kirby Company of Guam, he then agreed to pay Sayre & Company, Ltd., Hawaii, a commission, based on the fact that he had exclusive franchises to sell the various items (R 22). These commissions were set up on the Kirby books as owing to Sayre & Company, Ltd., as follows: 1955: \$4,560; 1956: \$4,450.94; 1957: \$4,687.28 (R 23). The Kirby Company of Guam also set up on its books the loan obligation to Sayre & Company, Ltd. During the year 1955, Kirby showed a payment of \$2,000.13 interest to Sayre & Company, Ltd., and its books showed interest accrued in the amount of \$2,321.19 for 1956 and \$2,437.25 for 1957 (R 47, 22).

The local Commissioner of Revenue and Taxation determined that these commissions and interest were

taxable to Sayre & Company, Ltd., and on April 1, 1965, advised Sayre of a deficiency for the tax years ended November 30, 1955, November 30, 1956, and November 30, 1957, in the aggregate amount of \$6,137.04 (Petition, pars. II and III; Answer, pars. 2 and 3). Sayre & Company, Ltd., filed a petition for redetermination on August 30, 1965. The District Court of Guam held that appellant was taxable under Section 881 of the Internal Revenue Code and gave judgment for the government in the amount of \$6,137 (R 52).

ISSUES PRESENTED

1. Can the Government of Guam tax the intangibles of a Hawaiian corporation?
2. In interpreting the provisions of the Internal Revenue Code does Guam stand in the position of one of the United States? Could appellant be considered a foreign corporation under the provisions of Section 881(a) of the Internal Revenue Code?
3. Does the taxation of appellant under Section 881(a) of the Internal Revenue Code discriminate against interstate commerce and deny due process of law?

SUMMARY OF ARGUMENT

Guam could tax appellant as a non-resident, foreign corporation under the provisions of Section 881(a) of the Internal Revenue Code. The provisions of the

Internal Revenue Code are in force in Guam. In applying the Guam territorial income tax "Guam" may be substituted for "United States" in the applicable provisions. Such tax is justified in view of the special status of Guam. No deductions are allowed. The tax imposed does not constitute a burden on interstate commerce nor deny due process of law.

1. CAN THE GOVERNMENT OF GUAM TAX THE INTANGIBLES OF A HAWAIIAN CORPORATION?

Under 48 U.S.C.A. Section 1421i(a) the income tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam. Under Section 1421i(e) in applying as the Guam territorial income tax the income tax laws in force in Guam, except where it is manifestly otherwise required, the applicable provisions of the Internal Revenue Codes of 1954 and 1939 shall be read so as to substitute "Guam" for "United States." "* * * and with other changes in nomenclature and other language, including the omission of inapplicable language, where necessary to effect the intent of this section."

Section 881(a) of the Internal Revenue Code imposes a tax on every foreign corporation not engaged in trade or business within Guam (substituting "Guam" for "United States") of 30% of the amount received from sources within Guam (same substitution) as interest, etc. The enumerated items of income may all be said to be intangibles. Counsel for appel-

lant contends that jurisdiction to tax intangibles can only occur in the corporation's domiciliary state. The residence of the obligor who pays the interest, rather than the physical location of the securities or the place of payments, is the determining factor of the source of interest income. 8 Mertens, Federal Income Taxation, Section 45.29 (1964). If counsel's contention be correct, then by the same reasoning, neither could Congress impose such a tax.

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2. IN INTERPRETING THE PROVISIONS OF THE INTERNAL REVENUE CODE DOES GUAM STAND IN THE POSITION OF ONE OF THE UNITED STATES? COULD APPELLANT BE CONSIDERED A FOREIGN CORPORATION UNDER THE PROVISIONS OF SECTION 881(a) OF THE INTERNAL REVENUE CODE?

The trial Court correctly held that the appellant was a foreign corporation and subject to tax under Section 881(a) of the Internal Revenue Code. (R 52, 53). The Court did not err in refusing to allow deductions.

Under Section 1421i(e) of the Organic Act of Guam (48 U.S.C.A.) above quoted, the applicable provisions of the Internal Revenue Codes of 1954 and 1939 shall be read so as to substitute "Guam" for "United States." If we are to adhere to the scheme of taxation as laid down by Congress in the Revenue Laws, it seems that like considerations must be entertained in drawing the distinction between a domestic and a foreign corporation for Guam tax purposes. Thus, since the Government of Guam has personal jurisdiction over all corporations organized in the territory of

Guam, it should tax these corporations on income from whatever source and thus treat them as domestic corporations. On the other hand, since it does not have personal jurisdiction over all corporations not organized in its territory, it should tax these corporations only on income over which it has jurisdiction and control, and treat them as foreign corporations. A further argument is found in the parallel problems besetting the Federal Government and the Government of Guam in effecting the enforcement of tax laws against corporations not within their jurisdiction. The problem the Federal Government faces in effecting collection of tax from a British corporation not doing business in the United States is similar to the problem faced by the Government of Guam in effecting collection of tax from a California or New York corporation not doing business in Guam.

The interpretation of Section 881 of the Internal Revenue Code so as to apply to appellant is also justified considering the special status of the territories vis-a-vis the United States. United States citizens who are legal residents of the territory cannot participate fully in the affairs of the Federal Government, nor do all grants of power and limitations of the United States Constitution apply in the unincorporated territories.

As to deductions, U. S. Treasury Regulation 1.882-3 provides that:

“For purposes of computing the tax imposed by Section 881(a) and described in Section 1.881-2, a non-resident foreign corporation shall not be

allowed any deductions, since the tax is imposed upon the gross amount received from sources within the United States.”

The lower Court therefore did not err in refusing to allow deductions.

As to the decision regarding appellant's corporate status, no objection was made by counsel to the holding of the Court that the appellant was a foreign corporation, nor in fact was any argument made on the point. It is well settled that where no objection is made to a ruling of the lower Court, the question will not be considered on appeal.

A party litigant may not sit quiet at the time action is taken in the trial Court and then complain on appeal, but he is required to indicate in some appropriate manner his objection or dissent. *Occidental Petroleum Corp. v. Walker* (C.A. Okla. 1961, 289 F.2d 1).

Objections not made in trial Court cannot be raised on appeal to Court of Appeals. *Pacific Contact Laboratories, Inc. v. Solex Laboratories, Inc.* (C.A. Cal. 1954, 209 F.2d 529, certiorari denied 75 S.Ct. 26, 348 U.S. 816, 99 L.Ed. 643).

3. DOES THE TAXATION OF APPELLANT UNDER SECTION 881(a) OF THE INTERNAL REVENUE CODE DISCRIMINATE AGAINST INTERSTATE COMMERCE AND DENY DUE PROCESS OF LAW?

Counsel for appellant argues that under the due process clause of the Constitution, a state cannot impose a tax unless certain minimum contacts or a nexus with the taxing state is established. As cited above under the first argument, the residence of the obligor who pays the interest, rather than the physical location of the securities or the place of payment, is the determining factor of the source of interest income. 8 Mertens, Federal Income Taxation, Section 45.29 (1964).

It has been held that generally the due process clause of the 5th Amendment is not a limitation on Congress' taxing power, and applies to a taxing statute only if so arbitrary as to constitute confiscation. *Kingman & Co. v. Smith*, 17 F.Supp. 217 (D.C. 1936).

Counsel also contends that the tax imposed, 30% without legitimate business deductions, unduly burdens interstate commerce. However, the rate of tax is not for the Courts to decide. It has been held that the fact that the rate of taxation is high does not make the tax a penalty or render it invalid, for where the power to tax exists the extent of the burden is a matter for the discretion of the legislative body. *White Packing Co. v. Robertson*, 4th Cir. 1937, 89 F.2d 779.

Furthermore, the tax is imposed on amounts received from sources within Guam (substituting "Guam" for the "United States"). It would therefore seem that interstate commerce is not involved.

CONCLUSION

The tax imposed on the appellant is legal. In construing the provisions of the Internal Revenue Code an analogy cannot be drawn between Guam and one of the United States, since Guam is an unincorporated territory and has a status unlike that of a state.

It is therefore respectfully submitted that the decision of the District Court of Guam should be affirmed.

Dated, Agana, Guam,
January 12, 1967.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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